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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939. 1940

No. 80

JULIUS G. BRASHEAR, CHARLES E. GRIGGS and MRS. CHARLES E. GRIGGS, his wife, in their own behalf and in behalf of others similarly situated, and HARRY W. HILL, Receiver of Intermountain Building & Loan Association, a corporation, successor to HENRY S. MCCLUSKEY, and GEORGE A. MAUK, Receivers of Intermountain Building & Loan Association, a corporation, *Petitioners*,

v.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation, CHARLES G. JOHNSON, State Treasurer of California, and RALPH W. EVANS, Successor to JUSTUS F. CRAEMER, Building and Loan Commissioner of California, *Respondents*.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

JAMES C. INGEBRETSEN,
1029 Rowan Bldg., Los Angeles,
Attorney for Ralph W. Evans, successor to Justus F. Craemer, Building and Loan Commissioner of the State of California.

EARL WARREN,
Attorney General,

FRANK RICHARDS,
Deputy Attorney General,
903 State Bldg., Los Angeles,
Attorneys for Charles G. Johnson, State Treasurer of California.

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OPINION OF THE COURT BELOW.

The Circuit Court of Appeals rendered an opinion which is reported in 109 Fed. (2nd) 857-863.

JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), and under Rule 38 of the Revised Rules of this Court. The date of the decree sought to be reviewed is February 20, 1940. Motion for rehearing was denied on April 9, 1940.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set forth in the Appendix, *infra*, pp. 12-19.

STATEMENT.

Intermountain Building and Loan Association was incorporated in Utah in 1921, as a building and loan association. Thereafter, the Association gradually expanded its business throughout a number of the western states. In 1927 the Board of Directors determined to seek a license to transact its business in the state of California (R. 566) and on April 13, 1927, transmitted to the Commissioner and to the Secretary of State, various documents required under the Building and Loan Act, including, among other papers, a certified copy of a Report of Examination made as of March 9, 1927, by the Banking Commissioner of the State of Utah (R. 571-685). On April 21, 1927, pursuant to the then requirements of section 646 of the California Civil Code (see Appendix) the Association transmitted to the Commissioner a certificate of deposit, in the sum of fifty thousand dollars ($50,000.00) (R. 696), for the protection and indemnity of California residents who should invest therein or with whom the Association should do business, upon receipt of which the Commissioner on April 25, 1927, forwarded to the Association its license for the balance of the calendar year 1927 (R. 697).

On August 14, 1931, a new and comprehensive Building and Loan Association Act was adopted, section 12.04 of

which required foreign associations to deposit a minimum of one hundred thousand ($100,000.00) dollars for the protection and indemnity of California residents instead of the fifty thousand ($50,000.00) dollars previously required, as a condition to doing business in this state and on August 13, 1931, the Association was notified by letter (R. 703-704) of the impending change in the law. On September 10, 1931 (R. 707) the Association deposited with the Commissioner a cashier's check for fifty thousand ($50,000.00) dollars, bringing the total amount of the deposit to the one hundred thousand ($100,000.00) dollar minimum required by the New Act.

Later, the Association got in difficulties and on April 18, 1933, a suit for money was commenced against the Association in the Federal District Court for Arizona by certain of its Arizona investors entitled *Guadalupe R. Gallegos, et al.* v. *Intermountain Building and Loan Association*, No. E-268 (R. 473). Neither the California Commissioner, the State Treasurer, or any California resident ever became, or were made parties to that proceeding (R. 151). There was a prayer in the complaint for an appointment of a receiver for the corporation's property in Arizona (R. 794).

In October of 1933 the California Commissioner ordered the Association not to accept any more payments from California investors (R. 447) and ordered the State Treasurer to discontinue remittance of interest coupons to the Association on the bonds held for the protection of California investors (R. 448).

On March 17, 1934, John A. Malia, Banking Commissioner of Utah, took possession of the business, property and assets of the Association located in Arizona and Utah. On March 19, 1934, Charles H. Carey, the Oregon Corporation Commissioner took possession in that state and on March 29, 1934, Friend W. Richardson, the then California Building and Loan Commissioner took possession of the assets in California (R. 474).

In the meanwhile the *Gallegos* case had lain dormant, but on April 4, 1934, the plaintiffs in that case applied to the Court for an order appointing a receiver to take possession of the assets in *Arizona* (R. 475) and on April 20, 1934, Henry S. McCluskey was appointed receiver *pendente lite* "of all personal and real property of every kind and character of the said defendant, Intermountain Building and Loan Association, a corporation, *situated in the state of Arizona, or which was situated in the state of Arizona at the time of the filing of the bill of complaint in this suit*" (R. 1033). (Italics ours)

John A. Malia, the Utah Banking Commissioner, appealed from said order appointing a receiver and also from an order refusing permission to him to intervene in the suit (R. 476).

Both orders mentioned above were affirmed by the Ninth Circuit Court of Appeals and certiorari was denied by the United States Supreme Court on November 11, 1935 (R. 477). In the meantime, however, the Utah Commissioner had remained in possession and control of the assets in Arizona under a supersedeas bond (R. 1056) and it was not until December 2, 1935, that the Arizona assets were turned over to the receiver appointed in the *Gallegos* case. On February 8, 1936, the order of April 20, 1934, appointing a receiver for the Arizona property was "affirmed and made permanent" (R. 512-513).

Long before this, on May 5, 1934, the California Commissioner had determined to liquidate the California assets (R. 480), and gave notice to those having claims to file the same (R. 481).

The assets in California consisted of (1) the $100,000.00 fund deposited for the protection of California investors, (R. 708-710) and (2) general unpledged assets consisting of 8 parcels of real estate, two notes secured by mortgages on California property, and a small amount of cash (R. 547).

On August 21, 1935, the California Commissioner filed a petition with the Superior Court of the State of California

in and for the County of Los Angeles asking for instructions with reference to the distribution of the California assets (R. 711-744). The petition was set down for hearing and heard on October 1, 1935, upon notice fixed by the Court pursuant to provisions of the Building and Loan Association Act (R. 563, 744-746).

John A. Malia, the Utah Commissioner, who was still in charge of the Association and its assets, except in Oregon and California, but including those in Arizona, was notified of the hearing and submitted to the jurisdiction of the Court by filing an answer and cross-petition (R. 747-754) and appearing by counsel at the hearing. Numerous other investors likewise appeared in the proceeding (R. 564) and after argument the petition was taken under submission and on December 28, 1935, the Court made and entered its order (R. 564, 755-759) instructing and directing the California Commissioner to distribute the guarantee fund to California residents entitled to protection under the terms of the Building and Loan Association Act, to the extent of amounts paid in while residing in California, with interest at the legal rate from March 29, 1934.

On February 26, 1936, and within the time within which an appeal might have been taken from the order of December 28, 1935, the Arizona receiver, who had then replaced the Utah Commissioner as to the assets in Arizona, joined with other investors who were nonresidents of California to bring the present proceeding for the appointment of ancillary receivers to liquidate all assets located in California and to enjoin the California Commissioner from distributing the $100,000.00 guarantee fund pursuant to the state statutes and the Superior Court order.

Thereafter, but not until January 5, 1937, the final decree was entered in the *Gallegos* case. The instant case came on for trial in November, 1937. The District Court determined that the California Building and Loan Commissioner had the right and duty to liquidate all of the assets in California and to distribute them pursuant to state law and that no

receivership was necessary in California (R. 146-148). The Court further determined that all of the provisions of the California Building and Loan Association Act involved were constitutional, that the deposits required by law for the protection of California investors as a condition to transaction of business in California by the Association were legally made, that the Association was not insolvent when the deposits were made, that the Commissioner had no knowledge of any insolvency or of any acts which showed insolvency or which if investigated would have disclosed insolvency, and that the decision in the *Gallegos* case was not *res adjudicata* as to any rights of the Building and Loan Commissioner or the State Treasurer (R. 146-148).

Pursuant to said Decision and the Findings of Fact and Conclusions of Law, (R. 149-154) the Court made and entered a decree dissolving the temporary restraining order theretofore in effect and denying any relief to the plaintiffs either by way of an injunction or the appointment of ancillary receivers or otherwise (R. 173-174). Upon an appeal by plaintiffs from this decree the Circuit Court affirmed the decree of the District Court but vacated Findings of Fact I, II, and III (R. 149) and Conclusion of Law I (R. 153) as unnecessary to the decision (R. 1165).

At the time of trial Justus F. Craemer was the California Building and Loan Commissioner. He was succeeded by Ralph W. Evans who was, on November 1, 1939, substituted in his official capacity as a party to the case for and in the place of Justus F. Craemer. (R. 1149.)

QUESTIONS PRESENTED.

The statement of questions presented as brought forward by petitioners is as follows (Pet. 8):

> "(1) Are the findings of fact, conclusions of law and decrees as made by the United States District Court for the District of Arizona in the original class suit with respect to the period over which the Association

was insolvent, the right and title of the receiver to the assets and the trust character thereof, res judicata as to the California investors and their privies, and hence entitled in California to full faith and credit under Article IV of the Constitution of the United States?

"(2) Were petitioners entitled to a determination of whether the California Building and Loan Act is unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States on the basis that it abridges their privileges as investors in the Association and impairs the obligations of their several contracts and deprives them of their property without due process of law?"

ARGUMENT.

Although Petitioners' Brief in support of their Petition covers some additional ground, only the two questions noted above are specifically brought forward in the Petition for consideration. Under the rule (Rules of the Supreme Court, Rule 38, (2)) only these specific questions may be considered and accordingly the argument by respondents will be addressed directly to the two questions stated in the Petition.

I.

The decision of the Circuit Court of Appeals that the findings, conclusions, and decree in the *Gallegos* case were not res judicata as to the parties or with respect to the issues involved in the instant case is not in conflict with applicable decisions of this Court, and no important question of local or federal law is involved in the Circuit Court's disposition of the issue.

Petitioners insist that a conflict exists. The cases cited by them obviously fail to sustain the contention. We do not quarrel with any principle announced in the cases relied upon.

It is of course true, as stated in *Hartford Livestock Insurance Co.* v. *Ibs*, that a decree rendered in a class suit is binding upon other members of the same class where those who were not parties to the proceedings "had an interest that was in fact similar", 237 U. S. 662, 672, 59 L. Ed. 1165.

No one would deny the soundness of the declaration in *Roche* v. *McDonald*, 275 U. S. 449, 72 L. Ed. 365, that a judgment of a state court which has jurisdiction over the parties and over the subject matter should have the same credit, validity and effect in the courts of other states as in the state where rendered.

The decision of the Circuit Court is not in conflict with those or other decisions cited by petitioners in any particular whatsoever.

The defense of res judicata was disposed of by both the District Court and by the Circuit Court of Appeals in absolute harmony with these cases. The decision of the Circuit Court on this point rests upon the factual ground (strictly within the Findings of Fact by the District Court R. 152) that neither the identity of subject matter nor the identity of parties necessary to support the plea of res judicata had been established. Nothing said in any one of the cases relied upon by the petitioners casts the slightest doubt on the soundness of the Court's determination of these factual issues. In fact, the decision of the Circuit Court is in strict accord with the decisions of the Supreme Court.

In holding (R. 1163) that the appointment of a receiver by the District Court for Arizona did not have and could not have had any extraterritorial effect with respect to the properties located in the State of California, the Court soundly followed the rule applied in *Great Western Mining & Mfg. Co.* v. *Harris*, 198 U. S. 561, 574-578, 49 L. Ed. 1163, and *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 79-85, 67 L. Ed. 871.

The Court was obviously correct in ruling as it did, that the situation of the Building and Loan Commissioner and

the State Treasurer of California and the situation of the named plaintiffs in the *Gallegos* suit were not similar, and that the facts and issues presented in connection with the two cases were entirely different and did not and could not support the plea of res judicata.

II.

The decision of the Circuit Court of Appeals that the question of the constitutionality of the state statute involved (as well as other questions in connection with the liquidation of the assets in California) should properly be left to determination by the state court is not in conflict with any decision of this Court but on the contrary precisely follows the now well-established principles laid down in a number of decisions by this Court, including, among others, the following,

Pennsylvania v. *Williams*, 294 U. S. 176, 182-186; 79 L. Ed. 841.
Gordon v. *Ominsky*, 294 U. S. 186, 188; 79 L. Ed. 848.
Gordon v. *Washington*, 295 U. S. 30, 36-40; 79 L. Ed. 1282.
United States v. *Bank of New York Company*, 296 U. S. 463, 475-479; 80 L. Ed. 331.

These cases clearly lay down the rule that where, as in this case, the statutory procedure is adequate and has been honestly and diligently followed, the federal court will properly refuse to appoint receivers or otherwise interfere with the administration of state supervisory statutes by state officials. Questions with respect to the interpretation of particular provisions of such statutes and their constitutionality are properly left to the State Courts for decision.

Ample opportunity was afforded to the Arizona receiver and his co-plaintiffs in this suit to assert their contentions in the State Court. The statement on page 18 of petitioners' brief, that "the California Act provides only for the appearance of stock-holders and investors in the ordinary sense of the word, and affords no remedy or procedure for

those who assert that the fund sought to be distributed is a trust fund of which they are the express beneficiaries" is not borne out by the facts. No portion of the California Building and Loan Association Act purporting to make such a distinction is referred to or quoted by petitioners in their brief or the appendix. No such provision is referred to by the Court in its opinion. Respondents are aware of no such distinction, and assert that none exists.

None of the cases cited by the petitioners support the proposition that the question of constitutionality should have been passed upon by the Circuit Court. The cases cited simply hold that particular statutes, differing substantially from any before the Court in the case at bar, were unconstitutional. The question whether the issue of constitutionality should have been left to a State Court for decision under circumstances similar to those at hand is not considered, or even referred to, in any one of the cases cited.

The California statute is unquestionably constitutional[1]

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[1] The rule is a familiar one and it has been held in numerous cases that a corporation organized in one State has no right to do business in any other State except with the consent of such other State, which, therefore, has the right either to entirely prohibit the foreign corporation from doing business within the State or, the right to permit the transaction of business only upon such terms and conditions as the State may see fit to impose (see the discussion of this rule in 14-a *C. J.* 1244, section 3948 *et seq.*).

One of the conditions which a State may lawfully impose by statute is that the foreign corporation desiring to do business in the State shall first deposit with State authorities money or securities for the protection of residents of the State with whom the corporation may do business. It is further held that irrespective of the possibility of any particular statute being unconstitutional, the objection is waived where the corporation elects to accept the benefits of the statute and does comply with the condition imposed and thereafter transacts business within the State, the rule being that if the statute is to be attacked on constitutional grounds, action must be taken before the corporation comes into the State. Some of the principal authorities upholding statutes such as the one involved here are:

Brady v. *Mattern* (Iowa), 106 Am. St. Rep. 291, 100 N. W. 358;

but, even if there were doubt as to that, the question now before the Court is whether the Circuit Court was correct in declaring that the argument against the statute was one to be presented in the State Court under the circumstances presented by the record. On that question, as we have shown, there is no conflict whatsoever between the decision of the Circuit Court and the decisions of this Court.

CONCLUSION.

The decision of the Court below was correct. There exists no conflict and no questions of substantial importance are raised by the petition. We therefore, respectfully submit that the petition for a writ of certiorari be denied.

JAMES C. INGEBRETSEN,
Attorney for Ralph W. Evans as successor to Justus F. Craemer, Building and Loan Commissioner of California,

EARL WARREN,
Attorney General,

FRANK RICHARDS,
Deputy Attorney General,

Attorneys for Charles G. Johnson, State Treasurer of California, Respondents.

September, 1940.

Lewis v. *American Savings & Loan* (Wis.), 73 N. W. 793, 39 L. R. A. 559;
Bank Commissioners v. *Granite State Provident Assn.* (N. H.), 85 A. S. R. 646; 49 Atl. 124;
Irwin v. *Granite State Provident Assn.* (N. J.), 38 Atl. 680;
People v. *Granite State Provident Assn.* (N. Y.), 55 N. E. 1053;
Phillips v. *Perue* (Tex.), 229 S. W. 849;
Phillips, In re (N. Y.), 200 N. Y. S. 639;
Dailey v. *Federal Building & Loan*, 1 Fed. Supp. 231;
Clark v. *Williard*, 292 U. S. 112, 78 L. Ed. 1160; 294 U. S. 211, 79 L. Ed. 865;
Kelly v. *Knott* (Fla.), 163 So. 64, 298 U. S. 544, 80 L. Ed. 1321, 104 A. L. R. 741 (and note), 56 S. Ct. 902.